Supreme Court, U.S.
FILED

05 1447 MAY 12 2006

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No. 05-

In The

Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., *Appellant,*

v.

FEDERAL ELECTION COMMISSION, *Appellee,*

and

JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN, *Intervenor-Appellees.*

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

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Questions Presented

1. Whether the District Court erred in denying a preliminary injunction to allow The Christian Civic League of Maine, Inc. ("League") to continue broadcasting grass roots lobbying advertisements during the electioneering communication prohibition period ("the prohibition") imposed by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), codified at 2 U.S.C. § 441b, and in particular:

a. Whether the prohibition is narrowly tailored to a compelling governmental interest as applied to the League's proposed advertisement or violates the constitutional rights to free expression, association, and petition;

b. Whether the prohibition is narrowly tailored to a compelling governmental interest as applied to genuine grassroots lobbying generally or violates the constitutional rights to free expression, association, and petition;

c. Whether the League meets the requirements for a preliminary injunction by being denied the opportunity to use corporate funds for its proposed communication.

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

The Christian Civic League of Maine, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

Notice of Statutory Expedition & Advancement on the Docket

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress specified that in reviewing constitutional challenges, such as the present one, "[i]t shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal." BCRA § 403(a)(4), 116 Stat. at 114, App. 20a.

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Introduction

May the government use campaign finance laws to severely restrict the ability of citizens to lobby their Congressional representatives about upcoming votes in Congress? The right of the people to petition their government is separately protected by the First Amendment to the United States Constitution because it is essential to self-government, and the governmental interests that support regulation of campaign finance do not justify also restricting grassroots lobbying. Grassroots lobbying broadcast ads are genuine issue ads against which the "electioneering communication" prohibition may not be constitutionally applied.

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court facially upheld § 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 441b, entitled "prohibition of corporate and labor union disbursements for electioneering communications" ("the prohibition"). This provision prohibits[1] citizens groups such as The Christian Civic League of Maine, Inc. ("League" or "CCL") from mentioning the name of a federal candidate, including incumbent office holders, in any broadcast ad within 30 days of a primary and 60 days of a general election which is targeted to people in his or her particular election district. 2 U.S.C. § 434(f)(3)(A)(i). In *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) (per curiam) ("*WRTL*"), this Court held that the prohibition may be subject to an as applied challenge and remanded the case to the district court to consider an as applied challenge for grassroots

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[1] "Prohibit" herein means that the corporation or labor union "is *not* free to use its general funds for campaign advocacy purposes," including for electioneering communications, but may use PAC funds for this purpose. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 (1986) ("*MCFL*") (emphasis in original). *See also McConnell*, 540 U.S. at 203 (describing the purpose of 2 U.S.C. § 441b as "to *prohibit* contributions or expenditures by corporations and labor organizations in connection with federal elections" (emphasis added)).

lobbying "in the first instance."[2] *Id.* at 1018.

The present case also presents an as applied challenge to the prohibition for grassroots lobbying. The League has been running a broadcast ad urging citizens in Maine to contact their Senators and urge them to support a constitutional amendment proteeting traditional marriage scheduled for a Senate vote on or about June 5, 2006. The ad mentions the names of both Senators, and one of them, Sen. Snowe, is running unopposed in a June 13, 2006 primary. As a result, this ad is an electioneering communication which the League is prohibited from running during the 30 day blackout period beginning May 14.

Implicit in *WRTL* was this Court's decision that as-applied challenges could not be rejected merely (1) because there are alternative potential means of communication (such as not using broadcast media, not clearly identifying a candidate in an ad, or communicating at other times) or (2) because the ad could have some effect on an election. These were argued as reasons why as-applied challenges could not be permitted under *McConnell* and were necessarily rejected by the *WRTL* decision. Instead, this Court remanded the case to the district court to apply a proper strict scrutiny analysis of grassroots lobbying communications on their merits.

But that is not what the district court did in the present case, relying instead on the two rejected arguments, i.e., alternatives and effect, even though Sen. Snowe is running unopposed and the cited effects are remote and speculative. App. 8a-10a. The district court also speculated that legislators might schedule legislative activity during blackout periods in order to create issues suitable for grassroots lobbying. App. 10a-11a. But this is also speculative and, in any event, would deprive citizens of

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[2]Instead of expeditiously deciding the remanded case on existing cross-motions for summary judgment, the district court in *WRTL* set a schedule for 'iscovery and new summary judgment briefing, with oral argument not scheduled until mid-September 2006.

their right to petition the government about such matters. As a result, the district court neglected to engage in the narrow tailoring analysis that strict scrutiny requires.

Thus, this case is about the right to petition, raised at a time of busy legislative activity in the midst of an election year, so that the rights of numerous advocacy groups and labor unions are involved. The case implicates interests far broader than just that of the League. It is about the very nature of our system of government and the role of citizens in it.

The League asks this Court to note probable jurisdiction, expedite and advance this case on the calendar, consolidate the present jurisdictional statement briefing with briefing on the merits, and go to the merits, holding that the prohibition is unconstitutional as applied to the League's advertisement and to the sort of genuine grassroots lobbying that it represents.

Opinions Below

The unreported district court opinion and order denying preliminary injunction are reprinted in the Appendix. App. 1a, 14a.

Jurisdiction

The preliminary injunction motion was denied May 9, 2006. The League noticed appeal May 11, 2006. This Court has appellate jurisdiction over the interlocutory order of the three-judge court appointed under BCRA § 403. 28 U.S.C. § 1253.

Constitutional & Statutory Provisions

The First Amendment to the Constitution is at 15a.
2 U.S.C. § 434(f)(1)-(3) (definition) is at 15a.
2 U.S.C. § 441b(a)-(b)(2) (prohibition) is at 18a.
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11 C.F.R. § 100.29 (definition) is at 21a.
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Statement of the Case

On April 3, 2006, the League filed its Complaint seeking declaratory and injunctive relief allowing it to fund grassroots lobbying broadcast ads, including its current ad[3] asking the people of Maine to call their Senators and to urge them to support a constitutional amendment protecting marriage.[4] The vote on this constitutional amendment is scheduled for June 5th. The ad is an "electioneering communication" because it mentions the name of a federal candidate, Senator Snowe, who is unopposed in the upcoming June 13th primary, and the League is prohibited from paying for it with corporate funds for thirty days before that primary. The League sought a preliminary injunction to permit it to continue running its ad and a three-judge court, convened pursuant to BCRA § 403(a)(1), denied the preliminary injunction on May 9th. App. 1a, 14a. The League noticed appeal to this Court on May 11. App. 31a.

An "'electioneering communication' means any broadcast,

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[3]The text of the "Crossroads" ad, App. 1a-2a, is as follows:

Our country stands at the crossroads - at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges - by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard. Paid for by the Christian Civic League of Maine, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

[4]The League does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grassroots lobbying advertisements. Compl. ¶ 34.

cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office [and] is made within . . . 60 days before a general . . . election for the office sought by the candidate; or . . . 30 days before a primary . . . election . . . for the office sought by the candidate; and . . . is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)(i); *see also* 11 C.F.R. § 100.29. The prohibition provides that "[i]t is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any [Federal] election. . . . For purposes of this section . . . , the term 'contribution or expenditure' includes . . . any applicable electioneering communication . . . ." 2 U.S.C. § 441b(a)-(b); *see also* 11 C.F.R. §§ 114.2 and 114.14.

The League is a Maine nonprofit, nonstock, ideological corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code. Compl. ¶ 20. It was formed in 1897 and has been active since that date. Heath Dep. 14:12-14. The League's By-Laws set forth its purposes as follows:

> The purpose of the Christian Civic League of Maine shall be to present and maintain an effective, positive and faithful witness in the public life of our state; to have an impact on the development of public policy in Maine; to uphold a biblical standard of justice and righteousness; and to reflect a genuine Christina [sic] compassion and respect for all people. The League shall endeavor to (1) promote good citizenship; (2) elect honest and competent officials; (3) secure good laws and their impartial execution; and (4) cooperate and assist the home, church and schools in these efforts.

Heath Dep. Ex. ¶ 2. Within the past two years the League has not done anything other than produce voter guides to pursue its goal of electing honest and competent officials. Heath Dep. 16:18-17:8. Although the League intends to continue producing

voters guides, it has not and does not intend to endorse or oppose candidates for office, even through its associated state political action committee, the Christian Action League. Heath Dep. 17:2-4, 23:16-24:9; 25:2-12; 93:12-17.

The League does not qualify for any exception permitting it to pay for electioneering communications from corporate funds because (a) it is not a "qualified nonprofit corporation" (QNC) within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication prohibition, with which the district court agreed, App. 6a-7a, and (b) its ad is "targeted" so that it does not fit the exception for § 501(c)(4) organizations as described in 2 U.S.C. § 441b(c)(2). 2 U.S.C. § 441b(c)(6)(A). Compl. ¶ 22.

Defendant Federal Election Commission ("FEC") is the government agency charged with enforcing the relevant provisions of the Federal Election Campaign Act ("FECA"), as amended by the BCRA. The FEC considered creating a regulatory exception to the challenged prohibition for grassroots lobbying, but decided it was beyond the exception-making authority granted it by Congress. 67 Fed. Reg. 65190, 65200-02.

The League has been associated with Focus on the Family ("Focus") for approximately 15 years. Heath Declaration ¶ 3, April 21, 2006. Focus often corresponds with the League regarding policy issues of mutual interest, including the federal Marriage Protection Amendment. Heath Decl. ¶ 7. The defense of traditional marriage as the union of one man and one woman is a high priority for both organizations, which believe that traditional marriage is the foundation of society and the best environment in which to raise children. Heath Decl. ¶ 4. Court cases like those in Vermont and Massachusetts that forced civil unions and homosexual marriage on their citizens without benefit of the democratic process have highlighted for the

League the need for a federal Marriage Protection Amendment. Heath Decl. ¶ 5. Sometime in, or prior to, 2004 the League first became aware that Congress was considering a federal constitutional amendment protecting marriage. Heath Dep. 33:16-25. The League engaged in grassroots lobbying for the federal Marriage Protection Amendment in 2004 through phone calls, e-mail, the internet, printed and internet versions of its newsletter, "The Record," bulletin inserts, Heath Decl. ¶ 8; Heath Dep. 34:8-11, 35:1-8, and a radio ad encouraging people to contact Senators Snowe and Collins and ask them to support traditional marriage. Heath Decl. ¶ 8. That ad stated:

> The Christian Civic League of Maine is organizing a campaign to let Senators Snowe and Collins know that we support the Federal Marriage Amendment. If you want homosexual marriages banned in our country, we need you to contact your Senators and ask them to support traditional marriage. For more information on this amendment please see our website at www.cclmaine.org or call us at our Augusta office at 622-7634. Thank you for preserving the purity of life and protecting the future of this nation.

Pl.'s Resp. to Def.'s Req. for Prod. # 2, 3 and 4, "Radio Announcement, July '04."

In January 2005, the Marriage Protection Amendment S.J. Res. 1 was introduced. On November 9, 2005, the Subcommittee on Constitution, Civil Rights and Property Rights of the Committee on the Judiciary favorably approved the Marriage Protection Amendment for full committee consideration without amendment. 150 Cong. Rec. S8459-60. A vote for cloture in the Senate on S.J. Res. 1 is likely to occur in early June 2006. Compl. ¶ 9; *see also* Def.'s Ex. J in Supp. of Its Opp'n to Pl.'s Mot. for Prelim. Inj., *Republican Chief Outlines Strategy to Portray Democrats as Weak, Bypass Mainstream Media*, Feb. 11, 2006 (Frist "said he would push for a vote on June 5 on 'the marriage protection amendment.'". Previous

versions of a federal constitutional amendment to protect traditional marriage have not garnered sufficient support in Congress. Compl. ¶ 10. Therefore, the progress of S.J. Res. 1 in the Senate this summer is critical. Compl. ¶ 10. Tim Russell, the League's lobbyist, has participated in multiple conference calls, e-mail exchanges and discussions with legislators, grassroots activists, media, and national level pro-family groups regarding the federal Marriage Protection Amendment. Heath Decl. ¶ 9.

The decision regarding when to run ads like the "Crossroads" ad is necessarily tied to legislative decisions about debate and votes on the federal Marriage Protection Amendment. Heath Decl. ¶ 12; *see also* Heath Dep. 47:1-9. Because the timing of grassroots lobbying campaigns is inherently dependent on legislative whims, it is difficult to plan specific campaigns in advance and they are often created and executed within very short time frames. Heath Decl. ¶ 12. Such is the case with the "Crossroads" ad, which was developed because the Senate had finally decided to hold a vote on the federal Marriage Protection Amendment in early June. Heath Decl. ¶ 12. The League has confirmed its plan to run the "Crossroads" ad 22 times per week at a cost of $998 per week. Heath Decl. ¶ 15; Heath Decl. Ex. A. One long-time donor has committed to paying the entire $3,992 cost of the radio buy so that the ads may be run for four weeks as scheduled. Heath Decl. ¶ 16.

The League has been critical of Sen. Snowe's positions on marriage and partial-birth abortion, Heath Dep. 83:14-21, and would rather have a candidate whose views are closer to its own. Heath Dep. 85: 14-18. However, "CCL has not 'opposed' Senator Olympia Snowe or 'endorsed' an opponent of hers in an election for federal office." Pl.'s Resp. to Def.'s Interrog. # 12; Heath Dep. Ex. 10 ¶ 12. Moreover, the "Crossroads" ad should not have any effect on Sen. Snowe's primary election because she is running unopposed. Heath Dep. 74:6-9.

The "Crossroads" ad expresses an opinion on pending Senate legislative activity, which is imminently up for a vote, and urges listeners to contact their Senators and to urge them to vote a certain way in that vote, so that this ad constitutes bona fide grassroots lobbying. The ad deals with concrete, imminent, legislative issues, beyond the timing and control of the League, with which the two incumbent Senators must deal. The ad refers to both a candidate and a non-candidate and deals with them equally. The ad deals exclusively with the legislative issue, with which the League has a clear and long-held interest, not on any candidate, and does not refer to any political party or election. The ad does not expressly advocate the election or defeat of a clearly identified candidate for federal office. The ad only comments on the League's opinion on prior votes on the marriage issue and does not comment on a candidate's character, qualifications, or fitness for office. The ad is broadcast independent of any candidate or political party in that it is not "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 11 C.F.R. § 109.20(a).

Broadcast advertisements are the most effective form of communication for the present grassroots lobbying campaign, and non-broadcast communications would not provide the League with sufficient ability to reach the people of Maine with the League's message. Compl. ¶ 46; Pl.'s Resp. to Def.'s Interrog. # 2, 3; Heath Dep. Ex. 10 ¶ 2, 3. While a non-broadcast communication is effective with regard to those who receive it, such communication is necessarily limited by the number of subscribers the League has to those communications, and broadcast ads, particularly radio ads, are more effective because they consistently reach more persons per dollar spent. Heath Decl. ¶ 17; Pl.'s Resp. to Def.'s Interrog. # 2, 3; Heath Dep. Ex. 10 ¶ 2, 3. Moreover, the League has found that renting

phone lists and hiring a phone bank for a telephone campaign is costly and not as effective as broadcast ads. Heath Decl. ¶ 18. Furthermore, people are more receptive to broadcast ads than the intrusive ring of unsolicited telephone calls which seem to come at inopportune moments. Heath Decl. ¶ 18.

Further, creating a federal political action committee would be more burdensome for the League than its affiliated State PACs because there are no limits on contributions to those entities because they were formed to support/oppose referenda. Heath Decl. ¶ 20. In contrast, federal PACs are subject to contribution limits, because they are presumed to be formed for the purpose of supporting or opposing candidates. Heath Decl. ¶ 20. Federal corporate PACs are also limited to fundraising from the corporation's members, which necessarily limits the pool of available contributors to the League's approximately 300 members[5] and would not encompass its nearly 2,500 supporters. Heath Decl. ¶ 20; Heath Dep. 41:9-42:14. The limited pool of donors would make it much more difficult to raise the funds needed to engage in a broadcast advertising campaign such as the "Crossroads" campaign it plans to undertake in support of the federal Marriage Protection Amendment. Heath Decl. ¶ 20.

In addition, some of the League's members have theological objections to contributing to political action committees, Heath Decl. ¶ 21; Heath Dep. 103:24-104:4, and some Christians are reluctant to link the church and the state too closely. Heath Decl. ¶ 21. Because some of the League's members subscribe to this belief, it would increase its difficulties in raising money

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[5]Membership in the League is limited to those who "sign[] a statement that they agree with the [the League]'s mission, Statement, Purpose and Statement of Faith . . . and who pay[] the annual membership fee." (Heath Dep. Ex. 1 ¶ 4a, By-Laws) Further, "[a]ll board members, officers, committee members and employees of [the League] must be members of [the League]." *Id.*

for a federal political action committee. Heath Decl. ¶ 21.

Finally, altering the League's ads so as to not mention the names of Maine's two Senators would not be as effective, because the point of the grassroots lobbying effort is to ask the citizens of Maine to call their Senators and tell them how they would like them to vote on the federal Marriage Protection Amendment. Heath Decl. ¶ 22. Giving the names of the Senators helps the potential callers to be more comfortable making the requested call because they can simply ask for him or her by name rather than dealing with the awkwardness of saying "I'm from Maine, I don't know the name of my Senator but can you connect me to him." Heath Decl. ¶ 22. Regardless, the League's executive director understands that simply saying "call your Senator" would still violate the electioneering communication prohibition, because the FEC's rule specifically says that an electioneering communication refers to a clearly identified candidate when it uses an "unambiguous reference" to the identity of the candidate and lists "your Congressman" as an example. Heath Decl. ¶ 22.

The Questions Presented Are Substantial

The questions presented are substantially greater than even the harm to the League, which in itself involves irreparable loss of First Amendment expression, association, and petition rights. Grassroots lobbying is a time-honored way that citizens involve themselves in the American system of participatory, representative democracy – it is the essence of self-government. At this busy election season, the rights of numerous similar groups who want to lobby their members of Congress are at stake.

Congress by statute has recognized that constitutional challenges to BCRA are so substantial that they require a special jurisdictional statute that directs all challenges to one court, with a three-judge panel, and provides direct, expedited appeal to this Court. BCRA § 403. There is no possibility of cases from other circuits percolating up to provide circuit splits

until sometime well after January 1, 2007, when challenges to BCRA may begin to be brought in other federal courts. *Id.*

I. The League Has Likely Success on the Merits.

What is the proper standard of review? While the appeal is from the denial of a preliminary injunction, that standard of review should not be employed for two reasons. First, because the League will lose forever its opportunity to speak before the anticipated June 5 Senate vote if relief is not granted, the decision on preliminary injunction resolves the whole matter so that it should be considered a final judgment.[6] Second, because of the press of time, this Court should go to the merits, so that it should not be limited to the standard for reviewing the denial of preliminary injunctions. But under either standard, the League should prevail and the League provides briefing on the preliminary injunction elements.

The League has a substantial likelihood of success on the merits of this as-applied challenge. In *McConnell*, 540 U.S. 93, this Court upheld the electioneering communication prohibition against a facial challenge. In *Wisconsin Right to Life*, 126 S. Ct. 1016, this Court explained that as-applied challenges to the electioneering communication prohibition were not resolved or precluded by its holding in *McConnell*. *Id.* at 1018. This is an as-applied challenge and the Constitution requires an exception to the electioneering communication prohibition. Any constitutionally sound exception will include the broadcast ad here and grassroots lobbying generally.

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[6] *Cf. Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1388 (9th Cir. 1986) (because denial of temporary restraining order "effectively decided the merits of the case" and there were "no facts in dispute," appellate court decided case "as an appeal from a final judgment denying permanent injunctive relief").

A. An Exception for Genuine Grassroots Lobbying Is Constitutionally Required.

Should incumbent politicians be able to insulate themselves from lobbying about upcoming votes in Congress through campaign finance regulations? The League believes not and seeks relief as to (1) its broadcast ad specifically *and/or* (2) grassroots lobbying generally.

1. The Constitution Protects Grassroots Lobbying.

The people are sovereign. U.S. Const. preamble; *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("In a republic . . . the people are sovereign . . . ."). In a constitutional republic, government is restricted to the powers expressly granted by the people. U.S. Const. amend. X. The people created legislators to represent them, U.S. Const. art. I, § 1; art. IV, § 4, and amended the Constitution to require that Senators be "elected by the people." U.S. Const. amend. XVII. The people mandated Congress not to restrict their rights to speak, associate,[7] and petition in the exercise of the people's sovereign right to participate in representative self-government. U.S. Const. amend. I.

The First Amendment is designed "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (citation omitted). "It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."

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[7] "[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas . . . ." *Buckley*, 424 U.S. at 16 (citations and quotation indicators omitted).

Id. at 777.

While the individuals who make up the League could engage in electioneering communication, 2 U.S.C. § 434(f) (requiring only disclosure if spending exceeds $10,000 in a calendar year), when they form themselves into an effective advocacy group for lobbying, their lobbying through broadcast ads is prohibited for up to 90 days during an election year. Citizen groups formed under the right of association are an essential component of democracy in action. In *Buckley*, the Supreme Court reaffirmed the constitutional protection for association: "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley*, 424 U.S. at 15."[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25.[8] This highest level of constitutional protection flows from the essential function of associations in allowing effective participation in our democratic republic by permitting amplified individual speech. *Id.* at 22.

Grassroots lobbying is also protected by rights not considered in *McConnell*, i.e., the inherent right of the people to participate in self-government and the express First Amendment right to petition, along with a line of cases protecting corpora-

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[8]When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). But when speech is limited, as here, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest, *Buckley*, 424 U.S. at 64-65, the standard employed for expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-59 (2001).

tions' right to contact both legislators and the public about pending legislative and executive matters.

The right of corporations to petition both the legislative and executive branches was recognized in *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127, 135 (1961). The Supreme Court held that attempts to influence the passage or enforcement of laws were constitutionally protected, essential to representative government, and could not constitute a violation of the Sherman Act:

> In a representative democracy such as this, these [legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137-38. *See also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("the right to petition extends to all departments of the government").

In *Bellotti*, 435 U.S. 765, the Supreme Court applied the right of petition to corporations that sought "to publicize their views on a proposed constitutional amendment . . . to be submitted . . . as a ballot question," *id.* at 769, and held that this was constitutionally protected. *Id.* at 776-78, 790-96. *Bellotti* noted that "the First Amendment protects the right of corporations to petition legislative and administrative bodies" and concluded that "there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity." *Id.* at 791 n.31; *see also Consolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980).

The overarching principle of these cases is the right of the people to lobby incumbent politicians about their conduct in

office. Where the express right of petition and the inherent necessity of the people's participation in self-government are added to the rights of free expression and association, the electioneering communication prohibition must yield to the weight of constitutional necessity and allow an exception for grassroots lobbying.

Grassroots lobbying is the work of a vibrant republic, with active involvement of the people in their own self-government. And self-government does not end 30 days before a primary or 60 days before a general election.[9] If the most effective means to do grassroots lobbying – broadcast media – can be banned during that time, then the people are deprived of their right to participate in their own self-government.

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[9]In *McConnell*, the ACLU provided a summary Chart of "Bills of Interest to the ACLU in the 106th Congress During the 60 Days Prior to the November General Election." Joint Appendix at 622-26, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*) and made the following observations about pre-election legislative activity:

> [E]lection years are often periods of intense legislative activity, as the district court recognized. During the 2002 election cycle, for instance, legislation creating a new federal Department of Homeland Security was under consideration in the midst of the pre-election period. . . . During the fall 2000 elections, dozens of critical legislative issues were pending in Congress during the 60 day general election blackout period. *See* [Chart]. Thus, it is not unusual for the ACLU's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election.

Brief of Appellant at 12-13, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*). A longstanding practice in Congress is to attach riders to appropriation bills, which are considered in the fall prohibition periods. Movement of controversial legislation to prohibition periods may reasonably be expected because less opposition can be generated at such times.

2. Grassroots Lobbying Is Not Electioneering.

a. There Is a Distinction Between Grassroots Lobbying and Electioneering.

The Internal Revenue Code makes a distinction between grassroots lobbying and electioneering. The Internal Revenue Code provides that:

> [A] "Grass roots lobbying communication" is "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof" and has three "required elements:" (1) "refers to specific legislation," (2) "reflects a view on such legislation," and (3) "encourages the recipient of the communication to take some action with respect to such legislation."

26 U.S.C. § 56.4911-2(b)(2)(i)-(ii). Advocacy groups such as the League that are exempt under 26 U.S.C. § 501(c)(4), may spend an unlimited amount of their general treasury funds on lobbying, either "grass roots lobbying" or legislative lobbying.[10] Charities exempt under 26 U.S.C. § 501(c)(3), however, may spend only an insubstantial amount on lobbying of any kind.

Under the IRC, electioneering is referred to as "political intervention" and is more severely restricted. Nonprofit corporations under § 501(c)(3) may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office," *id.*, while advocacy groups under § 501(c)(4) may do so, but may spend only an insubstan-

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[10]"Grass roots lobbying" includes "(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof," while "legislative lobbying" refers to "(B) any attempt to influence any legislation through communication with any member or employee of a legislative body or with any government official or employee who may participate in the formulation of the legislation." 11 C.F.R. § 4911(d)(1).

tial amount on political intervention. Political intervention is dealt with under the term of "exempt function," in 26 U.S.C. § 527(e)(2), and:

> means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

So the IRC distinguishes between lobbying, which is seeking to influence legislation, and political intervention, which is seeking to influence elections.[11]

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[11]A diverse group of interested parties has recently offered another useful proposal for defining a grassroots lobbying exception to the electioneering communications prohibition. The FEC has published Notice 2006-4, entitled "Rulemaking Petition: Exception for Certain 'Grassroots Lobbying' Communications From the Definition of 'Electioneering Communication." 71 Fed. Reg. 13557. The petition asked for an expedited rulemaking

> to revise 11 C.F.R. 100.29(c) to exempt from the definition of "electioneering communication" certain "grassroots lobbying" communications that reflect all of the following principles: 1. The "clearly identified federal candidate" is an incumbent public officeholder; 2. The communication exclusively discusses a particular current legislative or executive branch matter; 3. The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; 4. If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter; 5. The communication does not refer to an election, the candidate's candidacy, or a political party; and 6. The communication does not refer to the candidate's character, qualifications or fitness for office.

While the League does not believe that this rule goes as far as the Constitution extends protection to grassroots lobbying, it provides a useful definition

While the term "influencing" has not been construed in the IRC context, FECA contains a similar definition of electioneering by defining political "contributions" and "expenditures" as ones made "for the purpose of influencing any election for Federal office." 2 U.S.C.§§ 431(8)(A)(i) and 431(9)(A)(i). Because of the vagueness and potential overbreadth of this phrase, the Supreme Court has construed "influence" to require express advocacy of the election or defeat of a clearly identified candidate. *Buckley*, 424 U.S. at 79-80 (construing "purpose of influencing," in §§ 431(8) and (9), to require express advocacy), and *McConnell*, 540 U.S. at 190-92. *See also Buckley*, 424 U.S. at 42-44 (construing "relative to" to require express advocacy) and *MCFL*, 479 U.S. at 248-49 (construing "in connection with an election," in the prohibition at § 441b, to require express advocacy). As a result of these constructions, FECA clearly applied only to electioneering and not grassroots lobbying prior to enactment of BCRA.

Central to these "express advocacy" holdings, and to the speech protections of the First Amendment generally, was the idea that the *speaker* must be able to know, based on the meaning of the words he is speaking, which side of the line the speaker is on. Requiring "explicit words" of advocacy of the election or defeat of a candidate does this. *Buckley*, 424 U.S. at 43. Thus, the speaker is not left to "hedge and trim," wondering how the hearer might interpret the message based on factors external to the communication itself. *Id. McConnell* endorsed the express advocacy construction of the language at issue in *Buckley* and *MCFL* to avoid vagueness and overbreadth. 540 U.S. at 192.

BCRA added the electioneering communication provision, which applies to certain communications that "refer[] to a clearly identified candidate for Federal office," without any

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that balances the concerns of all sides and provides a workable test.

further content requirements. 2 U.S.C. § 434(f)(3)(A)(i)(1). *McConnell* upheld this provision on its face because it was not vague or overbroad. 540 U.S. at 194. It was not vague because "clearly identifying a candidate" is not vague. *Id.* (quoting definition). And it was not overbroad because electioneering communications generally were found to be the "functional equivalent of express advocacy." *Id.* at 206. However, since effective grassroots lobbying requires reference to an incumbent, who may be a candidate, this provision, on its face, encompasses grassroots lobbying, and this case presents the need to distinguish, for purposes of campaign finance laws, between grassroots lobbying and electioneering.

The distinction between grassroots lobbying and electioneering has been discussed in campaign finance cases, but has not yet been definitively decided. Justice Stevens raised the distinction in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), where he said that "there is a vast difference between *lobbying* and debating public issues on the one hand, and political campaigns for election to public office on the other." *Id.* at 678 (Stevens, J., concurring) (emphasis added). Justice Stevens' view seems to have been carried over to his opinion for the Court in *McConnell* where, in footnote 88, the Court reiterated that, while government may regulate electioneering, it may not regulate "genuine issue ads" and distinguished *McConnell* from *Bellotti*, 435 U.S. 765, and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). *McConnell*, 540 U.S. at 206 n.88. Justice Kennedy, moreover, argued in *McConnell* that corporations ought to be able to do both electioneering and lobbying. 540 U.S. at 764 (Kennedy, J., dissenting).

b. Genuine Grassroots Lobbying Is No Sham.

McConnell said that the "constitutionally adequate justification" for upholding the electioneering communication prohibition was that the "sham issue ads" considered there were the

"functional equivalent of express advocacy." 540 U.S. at 206. So the issue here is whether grassroots lobbying ads equate to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. Or is grassroots lobbying a "genuine issue ad" which may not be prohibited?

Grassroots lobbying ads are not "sham issue ads" and have nothing to do with elections. They are about legislative action and effective participation by the people in self-government. Lobbying seeks to influence the exercise of government power by incumbent officeholders today, while electioneering seeks to influence who will exercise governmental power in the future. The people's right to influence their representatives on pending legislative matters today is more pressing and potentially more important than who might be their representative next year.

Further, if this Court were to accept the proposition that the people may be silenced now on upcoming votes in Congress because it might affect future elections, where would it end? Based on such a proposition, grassroots lobbying could be banned at all times because it might always have a remote effect on elections. There would be no constitutional way to limit such a ban to 30 plus 60 days in a year.

Throughout the *McConnell* litigation, grassroots lobbying was perceived as different in kind from electioneering. Judge Leon, the controlling vote in the district court, clearly thought that grassroots lobbying must be excluded from the "sham issue ad" category. He found that grassroots lobbying did not support or oppose candidates, declaring that his approach to the electioneering communication definition

> assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, *genuine*

> *issue advocacy, specifically of the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate. See* Findings 368-73 (providing examples of legislation-centered advertisements that do not promote, support, attack, or oppose the election of a federal candidate).

McConnell v. FEC, 251 F. Supp. 2d 176, 803 (2003) (Opinion of Judge Leon) (emphasis added except as to "*unrelated*"). Up to 17% of the ads for which the *McConnell* district court did fact finding were "genuine issue ads" (in which Judge Leon included grassroots lobbying), with possibly more genuine ads in years with more hot-button legislative issues. *Id.* at 798-99.

c. Grassroots Lobbying Does Not Implicate *McConnell*'s Concerns.

Grassroots lobbying does not implicate *McConnell*'s expressed concerns about "sham issue advocacy." 540 U.S. at 132. *McConnell* clearly identified what the Court meant by that term, beginning with a section entitled "Issue Advertising." *Id.* at 126.

First, the Court noted that such ads "could be aired without disclosing the identity of, or any other information about, their sponsors." *Id.* In fact, the Court noted, "sponsors of such ads often used misleading names to conceal their identity." *Id.* at 128 (providing examples), 196-97 ("concealing their identities," "dubious and misleading names").

Second, the Court noted that "sham issue ads" closely resembled express advocacy ads. Both such ads and express advocacy ads "were used to advocate the election or defeat of clearly identified federal candidates," *id.* at 126, and *McConnell* provided an immediate example of what the Court meant by

that: "Little difference existed, for example, between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 126-27. In its discussion of BCRA Title II, the Court returned to this aspect of "sham issue ads" with this example:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
>
> > "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." 5 1998 Senate Report 6305 (minority views).
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.

540 U.S. at 193 n.78. This Court approved BCRA's solution of requiring disclosure and eliminating the use of corporate or labor union money for such ads, except as applied to *MCFL*-type corporations, which could not be prohibited from using corporate money for "electioneering communications" because such corporations do not pose the corruption risks represented by business corporations. *Id.* at 209-11 (creating the first as-applied exception to the prohibition).

Grassroots lobbying ads implicate none of these concerns. Because the League does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of

all electioneering communications, both as to disclaimers and public reports. The whole system would be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue. And to the extent there is a scintilla of perceived support or opposition to a candidate, a remote possibility necessitated by the people's sovereign right to participate in representative government, the people, with full disclosure as to the messenger, can make the ultimate judgment. "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 792 n.31 ("The First Amendment rejects the 'highly 'paternalistic' approach . . . .").

And there will be no ads resembling express advocacy or the "sham ads" that the Court found to be "functional equivalents." *Id.* at 206. As may be seen in the sample offered by the League, grassroots lobbying ads focus on passing or defeating pending legislation, not electioneering, and are of no (or only de minimis) value for the purposes of opposing or supporting candidates. But they are essential to self-government.

Further, the desirability of a "bright-line rule" does not defeat this as-applied challenge. The Supreme Court has already decided that where constitutional justification is absent, the "desire for a bright-line rule. . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263 (emphasis in original).[12] This Court in *WRTL* also necessarily rejected a bright-line rule approach, when it approved as-applied challenges to the prohibition. 126 S. Ct. 1016.

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[12]In any event, this Court could adopt a bright-line test for grassroots lobbying that is every bit as bright as the exception for *MCFL*-type corporations created in *MCFL*. *Id.* at 263-64. The sort of "genuine issue ads" that constitute grassroots lobbying can be neatly cabined without placing any burden on the courts or the FEC.

3. The League's Ad Is Not Electioneering.

Furthermore, the League's grassroots lobbying ad is not express advocacy or its functional equivalent. In making this determination, the text of the ad itself must be examined, not external factors. *Buckley*, 423 U.S. at 43 (express advocacy is "limited to *communications* that include *explicit words* of advocacy . . ." (emphasis added)). The ad does not, of course, contain explicit words expressly advocating the election or defeat of a clearly identified candidate, nor is it the functional equivalent.

The sole focus of the ad is imminently pending, specific legislative activity while Congress is in session, the timing of which was beyond the control of the League. The ad asks for calls to *incumbent* Senators who clearly have power to immediately affect the Amendment. These are unlike the "sham issue ads" that ask hearers to call candidates, even non-incumbents, about something vague, abstract, unfocused, and/or possibly in the past.

The main reference to Sen. Snowe is in the closing call to her constituents to contact her and ask her to support the Amendment. As Judge Leon noted, even the *McConnell* defendants' own expert concluded that an ad mentioning a candidate's name is a genuine issue ad, if "the body of the ad has no referent to [a candidate] whatsoever [and] the only referent to [the candidate] is the call line." 251 F. Supp. at 795.

The League's ad asks constituents to call *both* Sen. Collins and Sen. Snowe, lessening the focus on Sen. Snowe even more and indicating that the issue was the Amendment, not Sen. Snowe. The ad mentions no election, candidacy, or political party, and says nothing about the Senators' character, actions, or fitness for office. The ad does say that the Senators had both opposed the Amendment in an earlier permutation, but this is a reference to their position on an issue, not their suitability for office.

The ad deals with non-candidate Collins and candidate Snowe equally, not singling Sen. Snowe out in any way. The ad deals with a long-time, natural concern for the League, which would like a federal marriage-protecting amendment passed, so there is no question of a made-up issue. The League will run the same ad outside the blackout periods during which time there is no congressional or court finding that there is any equivalence with express advocacy. And the ad deals with an unprecedented issue of vital national importance that is just now coming to a head at a scheduled vote for cloture in early June, which facts were a matter of public record and beyond the League's control.

In sum, the League's ad is not of the "functional equivalent of express advocacy." Prohibiting the League from running it with its general treasury funds would therefore be unconstitutional.

B. The District Court's Analysis Is Flawed.

The district court's analysis was flawed in several ways. It relied on the presence of alternatives, such as using a PAC[13] or not broadcasting the Advertisement, or doing it some other time. App. 9a. But this ignores the plain implication of *Wisconsin Right to Life*, 126 S. Ct. 1016, which rejected the argument that as-applied challenges could not be brought because *McConnell* said such alternatives were sufficient. The existence of such alternatives is presumed in all as-applied challenges in the wake if *WRTL*, but they do not establish narrow tailoring.

Similarly, the district court relied on the fact that there might be some effect on the election. App. 10a. But *WRTL* implicitly rejected such arguments as sufficient to bar grassroots

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[13]Requiring grassroots lobbying to be done in a PAC would subject that activity to contribution limits, but contribution limits are unconstitutional in the context of grassroots lobbying because there is no potential for corruption. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

lobbying. Almost anything may affect elections, but that does not mean the Congress may regulate everything for that reason. And the effects the district court recited are too remote, speculative, and lacking in any real nexus to a compelling interest to satisfy strict scrutiny.

The district court speculated, with no record evidence, that Congress might schedule legislative activity near elections in order to permit grassroots lobbying that might be helpful to candidates. App. 101-11a. But if Congress cannot be trusted in that respect, neither can it be trusted not to schedule important matters within prohibition periods, necessitating an exception to the prohibition for grassroots lobbying. More importantly, can the people's rights be made to depend on what politicians might do?

One unique detail of the League's ad reaches further than those at issue in *WRTL*, but does not reach the outer limits of what the Constitution requires. The League believes that there is no constitutional justification for prohibiting a citizen group from stating a legislator's position (for, against, or undecided) on a pending legislative matter in a grassroots lobbying communication. However, the district court decided that the Advertisement was really a "sham" because of the use of the word "unfortunately," when stating that the Senators voted against the constitutional amendment previously. App. 10a. The district court called this a "veiled attack." *Id.* But a "veiled" attack necessarily cannot be the functional equivalent of express advocacy, which required express words of advocacy. "Unfortunately" does not even rise to the level of supporting, opposing, attacking, or promoting. It is a mild statement about the differing positions of the League and the Senators on the constitutional amendment, which is appropriate for grassroots lobbying.

The district court never even discussed the right to petition, which was a central part of the Leagues's argument. And simply

reviewing its opinion shows that it did not actually engage in narrow tailoring analysis, although it purported to do so by using the words. App. 8a-9a. The district court failed to come to grips with the real issues of this case and was wrong in its conclusion.

II. The League Will Suffer Irreparable Injury.

The League is currently barred by BCRA from engaging in grassroots lobbying communications that refer to Senator Snowe from May 14, until June 13 2006, which is precisely the time when the League needs to run an ad encouraging support of the Marriage Protection Amendment. Without injunctive relief, the League's ability to make these communications will be irreparably lost. Loss of First Amendment rights is automatically irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, this required element for preliminary injunctive relief is met.

The district court said there was no irreparable harm because of the alternatives available to the League and because it had failed to establish likelihood of success on the merits. The Court was wrong because the implication of *WRTL* is that reciting alternatives is an insufficient analysis, as already discussed, and because it was wrong on its analysis as to the likelihood of success.

III. An Injunction Harms No Other Parties.

The League would be freely able to run its ad, and may continue to freely do so up until May 14, without any constitutionally cognizable harm to anyone. On May 14, the League may continue to run its ad calling on Sen. Collins to support the Amendment without any cognizable harm to anyone. And no harm will arise at the stroke of midnight on May 13 to Sen. Snowe because the League's ads are about Sen. Snowe's job as

a Senator, accountable to the people of Maine year-round, and not about her position as a candidate. It is so because rallying constituents on an urgent, important legislative issue is not a harm to a legislator – it is part of her job to be petitioned by the people. It is so because it is part of the American system of participatory democracy. It is so because gagging the people right before vital legislative action is not narrowly tailored to any compelling governmental interest. Moreover, it is so because Sen. Snowe is unopposed in the Maine Republican primary: what interest does the government have in curtailing calls to lobby a Senator during a period when she is not even challenged? Therefore, there will be no constitutionally cognizable harm to others if the requested injunctive relief issues.

The district court was unable to point any real harm to Sen. Snowe, although it speculated some unlikely possibilities, so it relied on harm to the FEC and the public in not being able to enforce the law as it exists. App. 12a. But of course, if that were always prevailing there could never be a preliminary injunction against the FEC. That is not the law, however. If the constitution requires an exception for grassroots lobbying, as this Court may readily determine, the FEC has no interest in enforcing the law as so applied.

IV. An Injunction Is in the Public Interest.

It is clearly in the public interest for Americans to be able to associate in citizen groups, such as the League, to more effectively involve themselves in the American system of participatory government by expressing themselves on imminently pending legislative matters and calling on other citizens to petition government officials. It is in the public interest for citizens to know about the issue of the federal Marriage Protection Amendment and the ongoing conflict over it. Therefore, the requested injunctive relief serves the public interest.

The district court found no public interest in protecting the public's right to engage in self -government by exercising the right to petition. App. 13a. It failed to take into account this Court's decision in *McConnell* and *WRTL*, which indicated clearly that there are "genuine issue ads" that have constitutional protection.

Conclusion

For the foregoing reasons, the Court should note probable jurisdiction, expedite and advance this case on the calendar, consolidate the present jurisdictional statement briefing with briefing on the merits, and go to the merits, holding that the prohibition is unconstitutional as applied to the League's advertisement and to the sort of genuine grassroots lobbying that it represents.

Respectfully submitted,

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APPENDIX

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[file mark: May 9, 2006]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., Plaintiff,	) Civil Action No. 06-0614 (JWR, LFO, CKK) (Three-Judge Court)
v.	)
FEDERAL ELECTION COMMISSION, Defendant,	)
and	)
JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN, Intervenor-Defendants.	)

MEMORANDUM OPINION

Plaintiff, the Christian Civic League of Maine, Inc. (the "League"), is a self-styled "nonprofit, nonstock . . . ideological" corporation that engages in some business activity. Verified Complaint ¶¶ 20, 22. It strongly supports the proposed Marriage Protection Amendment (S.J. Res. 1), now pending in the United States Senate. Anticipating that the Senate will discuss and vote on this Amendment in early June 2006, the League plans to use its general corporate funds to broadcast in Maine, between May 10 and early June 2006, the following radio advertisement:

> Our country stands at the crossroads – at the intersection of how marriage will be defined for future generations.

> Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges – by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard.

Id., Ex. A. A single, individual donor has committed to a donation to the League to cover the cost of funding the broadcast.

However, the Federal Election Communications Act – as amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, and codified at 2 U.S.C. § 431 *et seq.* (the "Act") – prohibits corporations from using general corporate funds for "electioneering communication[s]," 2 U.S.C. § 441b(a), (b)(2), defined as any "broadcast, cable, or satellite" communication, issued within thirty days of a federal primary election or sixty days of a general federal election (the "blackout period"), that "clearly identifie[s]" a candidate in that election and "target[s]" the relevant electorate, 2 U.S.C. § 434(f)(3)(A)(i). Because Senator Snowe is a candidate in a primary election scheduled for June 13, 2006, the League's proposed advertisement falls within the definition of the "electioneering communications" barred by the Act.

Defendant Federal Election Commission is charged by the Act with the responsibility to enforce it. Seeking to bar the Commission from enforcing the Act with regard to its proposed advertisement, the League has filed a complaint against the

Commission along with a motion for a preliminary injunction.[1] The League contends that, although the Act by its terms bars its proposed broadcasts of the advertisement, the First Amendment[2] protects the League's right to run it because it addresses an issue expected to come to a vote in the Senate during the relevant time (i.e., because it constitutes, in the League's terms, "grass roots lobbying"). Senators John McCain and Russell Feingold and Congressmen Christopher Shays, Martin Meehan, and Tom Allen have intervened as additional defendants. On April 24, 2006, we held an expedited hearing on the League's motion for a preliminary injunction. *See* 28 U.S.C. § 2284.

The League concedes that it could publish its proposed advertisement, during the desired time period, without running afoul of the Act (and thus without implicating the First Amendment and/or any occasion for a preliminary injunction) if it:

(1) funded the advertisement through a political action committee rather than via general corporate funds;

(2) published the advertisement in a medium other than "broadcast, cable, or satellite" (e.g., newspapers, leaflets, e-mails, telephone banks); or

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[1]The League also seeks a preliminary injunction, unlimited time-wise, that would encompass "any electioneering communications by [the League] that constitute grass-roots lobbying." Verified Complaint, Prayer for Relief. The League, however, fails to define "grassroots lobbying" (other than as including its proposed advertisement) or to identify any necessity for the application of such a broader injunction. Accordingly, its request for the broader preliminary injunction is unwarranted. The balance of this memorandum opinion addresses the League's motion only insofar as it seeks an injunction barring the Commission from enforcing the Act against the League's proposed advertisement in the thirty days before Maine's June 13, 2006 primary election.

[2]The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

(3) altered the script of the advertisement to refrain from "clearly identif[ying]" Senator Snowe.

Given this concession, *inter alia*, we conclude that the League has established neither a substantial likelihood of success on the merits nor that it will be irreparably injured in the absence of the "extraordinary remedy" of a preliminary injunction. *See Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004); *accord Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, J., in chambers). We therefore also conclude that the requested preliminary injunction would substantially injure the Commission and not serve the public interest. Accordingly, as more fully explained below, an accompanying Order denies the League's motion for a preliminary injunction.

I. BACKGROUND

In *McConnell v. Federal Election Commission*, 540 U.S. 93, 189-94, 203-11 (2003), the Supreme Court upheld the Act's electioneering communications provision from a facial attack on its constitutionality under the First Amendment. The Court did so in full realization that the electioneering communications provision encompasses some "issue advertis[ements]." *McConnell*, 540 U.S. at 126-32, 189-94, 203-05. Indeed, the Court carefully catalogued the past use of such advertisements to influence elections improperly. *See id.* at 126-32. The Court cited examples, including the infamous "Bob Yellowtail" advertisement. It excoriated candidate Yellowtail for "t[aking] a swing at his wife," being "a convicted felon," and "fail[ing] to make his own child support payments" yet closed as if a mere issue advertisement: "Call Bob Yellowtail. Tell him to support family values." *Id.* at 193 n.78. The Court observed: "Little difference exist[s] . . . between an ad that urge[s] viewers to 'vote against Jane Doe' and one that condemn[s] Jane Doe's record on a particular issue before exhorting viewers to 'call

Jane Doe and tell her what you think.'" *Id.* at 126-27. Given these realities, the Court concluded that the Act's electioneering communications provision was tailored sufficiently narrowly to meet a compelling governmental interest and to survive constitutional scrutiny. *See id.* at 193, 204-06. As the Court pointedly noted: "[C]orporations and unions may finance genuine issue ads during th[e blackout] time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206.

Subsequently, a Wisconsin corporation – on facts markedly similar to those before us here – brought an as-applied challenge to the electioneering communications provision, seeking to run an "issue" advertisement in the run-up to a primary election. *See Wis. Right to Life, Inc. v. Fed. Election Comm'n*, slip op., No. 04-1260 (D.D.C. Aug. 17, 2004); slip op., No. 04-1260 (D.D.C. May 9, 2005). Holding that the Supreme Court's decision in *McConnell* necessarily foreclosed as-applied challenges to the electioneering communications provision, a three-judge district court denied that corporation's motion for a preliminary injunction and subsequently dismissed the case. The Supreme Court, however, reversed and remanded, clarifying that its decision in *McConnell* did not pose an absolute bar to as-applied challenges to the electioneering communications provision of the Act because the Constitution might require that a particular advertisement be exempted from the Act's definition of an electioneering communication. *See Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 126 S. Ct. 1016, 1018 (2006). The League argues that this is such a case.

II. ANALYSIS

The League's pending motion for a preliminary injunction presents two issues: (1) whether the League has standing, and (2) if it does, whether it is entitled to a preliminary injunction. As explained below, we conclude that the League has standing

but that a preliminary injunction is not warranted.

A. Standing.

The Commission first argues that the League lacks standing under Article III of the Constitution because it has failed to allege facts to demonstrate that it is injured by the statutory provision it challenges. *See* Commission Opp'n Br. at 14; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). Specifically, the Commission argues that the League lacks the funds it would need to run the advertisement, has not taken any steps to plan for its broadcast, and thus cannot demonstrate that it would be injured if it were unable to broadcast the advertisement provided to it by others. *See* Commission Opp'n Br. at 14. However, a declaration of the League's Executive Director, Michael Heath, affirms under penalty of perjury that it now has caused its proposed advertisement to be recorded and has a donor "committed to paying the entire $3,992 cost of the radio buy." Pl.'s Reply in Supp. of Mot. for P.I., Ex. A (Apr. 21, 2006 decl. of Michael Heath) ¶¶ 14-16. Mr. Heath also affirms that the advertisement addresses an issue of high priority for the League. *See id.* ¶¶ 4, 8. This evidence suffices to establish, for purposes of this preliminary injunction application, that – absent the requested injunction – the League would suffer injury in fact, since it is now ready, willing, and able to broadcast the proposed advertisement.

The Commission also argues that the League lacks standing because it *may* qualify as an "*MCFL* organization," rendering it exempt from the Act's electioneering communications provision. *See Fed. Election Comm'n v. Mass. Citizens for Life, Inc.* 479 U.S. 238, 262 (1986) (holding certain non-profit advocacy corporations – now known as *MCFL* organizations – exempt from an earlier version of the Act's limits on corporate expenditures); *McConnell*, 540 U.S. at 209-11 (holding that the

current Act's electioneering communications provision contains the same exemption); *see also* 11 C.F.R. § 114.10. To qualify as an *MCFL* organization, a corporation must not "engage in business activities"; on the other hand, it may obtain donations, at least under some circumstances, through "garage sales, bake sales, dances, raffles, and picnics." *Mass. Citizens*, 479 U.S. at 255, 264. The League, however, has submitted invoices that evidence its receipt of revenue from the sale of advertising space in its newsletter, *The Recorder*. We conclude that the League has submitted evidence sufficient, on the present record and under the present time constraints, to demonstrate that it will suffer injury in fact.[3] *See Lujan*, 504 U.S. at 560.

The Commission does not challenge the League's standing on other grounds, and we hold that the League has standing because it also meets the causation and redressibility prongs of the standing test. *See id.*

B. Preliminary Injunction.

It is well-settled that, in order to obtain a preliminary injunction, the movant bears the burden of demonstrating:

(1) "a substantial likelihood of success on the merits," *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995);

(2) "that it would suffer irreparable injury if the injunction is not granted," *CityFed Fin.*, 58 F.3d at 746;

(3) "that an injunction would not substantially injure other interested parties," *id.*; and

(4) "that the public interest would be furthered by the

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[3]The Commission argues that, in order to establish its standing, the League must seek an advisory opinion from the Commission on whether it nonetheless qualifies as an *MCFL* organization, thereby obviating any occasion for the Commission to become involved. At oral argument, however, the Commission could offer no assurance that it could provide such an opinion before May 14 when the relevant blackout period begins.

injunction," *id.*

In the present case, each of the four preliminary injunction factors counsels against the grant of the requested injunction.

1. Substantial Likelihood of Success on the Merits.

The League has not demonstrated a "substantial likelihood of success on the merits." *CityFed Fin.*, 58 F.3d at 746. On the one hand, enforcement of the electioneering communications provision to bar the League's proposed advertisement appears problematic under the First Amendment. The First Amendment protects corporate speech, at least where that speech pertains to "[a] matter[] of public concern." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-78, 790-96 & n.31 (1978) (quotation marks omitted). The League, the relevant corporation here, is a non-profit civic organization. Its proposed advertisement would address a legislative issue at a time when that issue is likely to be under consideration in the Senate. And the advertisement does not mention Senator Snowe's candidacy, which is unopposed.

Nevertheless, the electioneering communications provision, even in its application to the proposed advertisement, appears narrowly tailored to serve a compelling governmental interest. Particularly after *McConnell*, there can be no question that the governmental interest in maintaining the integrity of the electoral process is compelling. The Court recognized: "'[T]o say that Congress is without power to pass appropriate legislation to safeguard an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.'" 540 U.S. at 223-24 (quoting *Burroughs v. United States*, 290 U.S. 534, 545 (1934)). It held: "The latter question – whether the state interest is compelling – is easily answered by our prior decisions regarding campaign finance regulation, which represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205

(quotation marks omitted).[4] The League's status as a nonprofit, ideological corporation does not blunt this interest. *See Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 152-63 (2003).

The Act appears narrowly tailored as well with respect to the League proposal to pay for the broadcast of its advertisement from its corporate funds. Again in the words of the *McConnell* Court: "Because corporations can still fund electioneering communications with [political action committee] money, it is simply wrong to view the [electioneering communications] provision as a complete ban on expression rather than a regulation." 540 U.S. at 204 (quotation marks omitted). Rather, the "ability to form and administer separate segregated funds . . . has provided corporations . . . with a constitutionally sufficient opportunity to engage in express advocacy." *Id.* at 203. Here, the Act does not bar the proposed advertisement; it only requires that the League fund it through a political action committee. Alternatively, the League may publish the advertisement with its own general corporate funds (i.e., without the use of a political action committee) so long as it uses a medium other than "broadcast, cable, or satellite," e.g., newspapers, leaflets, e-mails, telephone banks. 2 U.S.C. § 434(f)(3)(A)(i). Or the League could publish the advertisement, as a "broadcast, cable, or satellite" communication and using its general corporate funds, if it refrained from "clearly identif[ying]" Senator Snowe. *Id.* As the *McConnell* Court concluded: "[C]orporations and unions may finance genuine issue ads during th[e blackout] time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206.

Additionally, the advertisement that the League seeks to

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[4]For over a quarter of a century, Congress has legislated to restrict political expenditures by corporations – restrictions that do not and probably could not apply to individuals. *See, e.g.*, *McConnell*, 540 U.S. at 115-33.

broadcast appears to be functionally equivalent to the sham issue advertisements identified in *McConnell*. *See* 540 U.S. at 94, 126-27. The Supreme Court has explicitly acknowledged that "issue advertisements" that do not directly exhort citizens to vote for or against a particular candidate may have that effect. *See id.* at 126-29, 189-94, 203-11. Indeed, the League's advertisement – which characterizes Senator Snowe's past stance on the Marriage Protection Amendment as "[u]nfortunate[]" – is the sort of veiled attack that the Supreme Court has warned may improperly influence an election. *See id.* at 126-27. Here, the advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection. *See* Oral Arg. Tr. at 41-42. The League's own newsletter has already sounded an enthusiastic note regarding a potential challenger to Senator Snowe:

> Representative Duprey is the courageous third-term legislator who is the State House's most faithful defender of traditional marriage. Here, Representative Duprey announces for the first time that he is willing to run against Senator Olympia Snowe in next year's Republican primary. The Record is proud to be the first publication in Maine to provide you with this information.

Commission Opp'n Br., Ex. A (Apr. 5, 2006 dep. of the League) at Ex. 8 (excerpt from Feb. 23, 2005 League newsletter).

Moreover, the League's proposed "grass roots lobbying" exception would seriously impair the government's compelling interest in protecting the integrity of the electoral process. For example, candidates or their allies could easily schedule an issue for "legislative consideration" during the run-up to an

election as a pretext for broadcasting a particular subliminal electoral advocacy advertisement. In such a scenario, a scheduled hearing on "family values" might re-authorize even the Bob Yellowtail advertisement. Given these considerations, the League has not established a substantial likelihood of success on the merits.

2. Irreparable Injury From Denial of the Injunction.

The League has also failed to establish that "it would suffer irreparable injury if the injunction is not granted." *CityFed Fin.*, 58 F.3d at 746. It retains ready options for communicating its message regarding the Marriage Protection Amendment, consistently with the Act.

The facts as presently developed strongly suggest that the League will not suffer irreparable, or even significant, harm in the absence of the requested injunction:

(1) The League can broadcast the same advertisement by funding it through a political action committee. *See* 2 U.S.C. § 441b(b)(2). The League would enroll its individual donor in the political action committee and have him or her direct the donation through that committee rather than into its general corporate funds.

(2) The League could publish the text of the advertisement in a medium other than "broadcast, cable, or satellite," such as newspapers, leaflets, e-mails, telephone banks. 2 U.S.C. § 434(f)(3)(A)(i).

(3) The League could refrain from "clearly identif[ying]" Senator Snowe in the advertisement. *Id.*

As the three-judge district court concluded in the factually analogous *Wisconsin Right to Life v. Federal Election Commission*, No. 04-1260, slip op. at 7 (D.D.C. Aug. 17, 2004): "[T]he actual limitation on plaintiff's freedom of expression, as protected by the First Amendment, is not nearly so great as plaintiff argues."

Nor can the League benefit from the presumption that injury

from a First Amendment violation is irreparable. In *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Supreme Court stated: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." At this point, however, the League has established neither a First Amendment violation nor even the substantial likelihood of such a violation. Irreparable injury does not follow from "merely *alleg[ing]* the violation of First Amendment rights." *Wagner v. Taylor*, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (emphasis in original).

3. Substantial Injury From Grant of the Injunction.

The League's requested preliminary injunction would "substantially injure other interested parties." *CityFed Fin.*, 58 F.3d at 746. Specifically, it would injure the Commission and the public. "The presumption of constitutionality which attaches to every Act of Congress is . . . an equity to be considered . . . in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). As the *Wisconsin Right to Life* district court concluded:

> The harm to the opposing party, the Federal Election Commission, is evident. Everyone agrees that it is the statutory duty of the defendant to enforce the [Bipartisan Campaign Reform Act of 2002]. . . . We hold that an injunction against the performance of its statutory duty constitutes a substantial injury to the Commission
>
> . . . .

No. 04-1260, slip op. at 8 (D.D.C. Aug. 17, 2004).

4. Furtherance of the Public Interest.

Finally, the League has failed to establish that "the public interest would be furthered by the injunction." *CityFed Fin.*, 58 F.3d at 746. In the words again of the three-judge district court in *Wisconsin Right to Life*:

> [W]e do hold that the plaintiff has not established that the public interest would be furthered by the injunction. The Supreme Court has already determined that the provisions of the [Bipartisan Campaign Reform Act of 2002] serve compelling government interests. *See McConnell*, 125 S. Ct. at 695-96. To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court in *McConnell*, the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.

No. 04-1260, slip op. at 8-9 (D.D.C. Aug. 17, 2004).

III. CONCLUSION

For the foregoing reasons, an accompanying Order denies the League's motion for a preliminary injunction.

/s/
Judith W. Rogers
UNITED STATES CIRCUIT JUDGE

/s/
Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

/s/
Colleen Kollar-Kotelly
UNITED STATES DISTRICT JUDGE

DATED: May 9, 2006

[file mark: May 9, 2006]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., Plaintiff,	) Civil Action No. 06-0614 (JWR, LFO, CKK) (Three-Judge Court)
v.	
FEDERAL ELECTION COMMISSION, Defendant,	
and	
JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN, Intervenor-Defendants.	

ORDER

For the reasons stated in an accompanying Memorandum Opinion, it is this 9th day of May, 2006, hereby:

ORDERED: that the plaintiff's motion for preliminary injunction [Docket No. 4] is DENIED; and it is further

ORDERED: that the parties shall CONFER and SUBMIT, by May 22, 2006, a joint plan for the further administration of this case.

/s/
Judith W. Rogers
UNITED STATES CIRCUIT JUDGE

/s/
Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

/s/
Colleen Kollar-Kotelly
UNITED STATES DISTRICT JUDGE

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2 U.S.C. § 434(f)(1)-(3)

§ 434. Reports

* * *

(f) *Disclosure of electioneering communications.*

(1) *Statement required.* Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $ 10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement.* Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) *Electioneering communication.* For purposes of this subsection –

(A) *In general.*

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which

–

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions.* The term "electioneering communication" does not include –

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)).

(C) *Targeting to relevant electorate.* For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons –

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

2 U.S.C. § 441b(a)-(b)(2)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for

any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 79l(h)), the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 301 (2 U.S.C. § 431), and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication,

but shall not include

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

BCRA § 403(a), 116 Stat. at 113-14

Sec. 403. Judicial Review

(a) Special Rules for Actions Brought on Constitutional Grounds. – If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

11 C.F.R. § 100.29

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section –

(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate

in the State of Georgia."

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons –

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, http://www.fcc.gov. A link to that site is available on the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site

indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) Can be received by 50,000 or more persons means –

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's

protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour –

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional

district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that –

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) Electioneering communication does not include any communication that:

(1) Is publicly disseminated through a means of communi-

cation other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office; or

(6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

11 C.F.R. § 114.2(a)-(b)

§ 114.2 Prohibitions on contributions and expenditures.

(a) National banks and corporations organized by authority of any law of Congress are prohibited from making a contribution, as defined in 11 CFR 114.1(a), in connection with any election to any political office, including local, State and Federal offices, or in connection with any primary election or political convention or caucus held to select candidates for any political office, including any local, State or Federal office. National banks and corporations organized by authority of any law of Congress are prohibited form making expenditures as defined in 11 FR 114.1(a) for communications to those outside the restricted class expressly advocating the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party, with respect to an election to any political office, including any local, State or Federal office.

(1) Such national banks and corporations may engage in the activities permitted by 11 CFR part 114, except to the extent that such activity is foreclosed by provisions of law other than the Act.

(2) The provisions of 11 CFR part 114 apply to the activities of a national bank, or a corporation organized by any law of Congress, in connection with local, State and Federal elections.

(b)(1) Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR part 100, subpart B. Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 114.1(a) in connection with any Federal election.

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D;

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party; or

(iii) Making payments for an electioneering communication to those outside the restricted class. However, this paragraph (b)(2)(iii) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:

(A) The committee is not a political committee as defined in 11 CFR 100.5;

(B) The committee incorporated for liability purposes only;

(C) The committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and

(D) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

11 C.F.R. § 114.14

§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.

(a)(1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication.

(c) The prohibitions at paragraphs (a) and (b) of this section shall not apply to funds disbursed by a corporation or labor organization, or received by a person, that constitute --

(1) Salary, royalties, or other income earned from bona fide employment or other contractual arrangements, including pension or other retirement income;

(2) Interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or

(3) Receipt of payments representing fair market value for goods provided or services rendered to a corporation or labor organization.

(d)(1) Persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of an electioneering communication.

(2) Any person who wishes to pay for electioneering communications may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104. Use of funds exclusively from such an account to pay for an electioneering communications shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for an electioneering communication shall be required to only report the names and addresses of those individuals who donated or

otherwise provided an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

[file mark: "Received – May 11, 2006"]
United States District Court
District of Columbia

The Christian Civic League of Maine, Inc., 70 Sewall Street Augusta, ME 04330, ***Plaintiff,*** *v.* **Federal Election Commission,** 999 E Street, NW Washington, DC 20463, ***Defendant.***	**Cause No.** 1:06CV00614 (JWR, LFO, CKK) THREE-JUDGE COURT

Notice of Appeal of Denial of Motion for Preliminary Injunction to United States Supreme Court

Plaintiff, The Christian Civic League of Maine, Inc. (the "League"), hereby gives notice that it appeals to the United States Supreme Court from this Court's *Memorandum Opinion* (Docket #30, dated and filed May 9, 2006) and *Order* (Docket #31, dated and filed May 9, 2006) which denied the League's Motion for Preliminary Injunction and is effectively a final decision in the matter.

Appeal is taken pursuant to 28 U.S.C. § 1253 (providing for direct appeal to the Supreme Court from decisions of three-judge courts denying an interlocutory injunction) and Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 114 (Public Law 107-155) (providing for direct appeal to the Supreme Court of the "final decision" of this District Court).

Dated May 12, 2006

Respectfully submitted,

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